BADRUL ZAMAN PS MD ZAKARIAH

v.

TAMIL NESAN (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
PS GILL J
[CIVIL SUIT NO: S1(S7)-21-23-2001]
7 AUGUST 2001

CIVIL PROCEDURE: *Judgment - Default of appearance - Defamation - Prayers for general damages and injunction - Default judgment entered in form of final judgment for RM50 million - Whether irregular - Whether to proceed with action as if there was appearance - Whether to be set aside - Rules of the High Court 1980, O. 13 rr. 1(1), 5, 6(1)*

The plaintiff had obtained a judgment in default of appearance in respect of a claim for defamation in which he sued the defendants for general damages of RM50 million and also for an injunction. The defendants appealed and argued that the judgment was irregularly obtained, as the plaintiff, by praying for an injunctive relief, ought to have proceeded with the action as if the defendant had entered an appearance, and was thus incompetent to apply for a judgment in default of appearance. The issue that arose was whether, upon the tenor especially of the provisions of O. 13 r. 6(1) Rules of the High Court 1980 ('RHC'), the default judgment herein was irregularly obtained and ought to be set aside.

Held:

[1] In view of the prayer for injunction, the relief under O. 13 r. 1(1) or O. 13 r. 5 RHC is not available to the plaintiff. On the contrary, O. 13 r. 6 RHC would be the proper mode if at all for the plaintiff to obtain judgment in default of appearance. (p 89 c-d)

[2] The effect of O. 13 r. 6(1) RHC is to preclude the plaintiff from entering judgment in default of appearance, in every case in which the indorsement on the writ contains a claim which is not squarely within O. 13 rr. 1 to 4, and to require him to proceed as if the defendant had appeared. This being the case, and since the plaintiff's writ was indorsed with a claim for an injunction, a remedy falling outside the descriptions specified in O. 13 rr. 1 to 4, the plaintiff cannot therefore enter judgment in default of appearance. (p 89 f-g)

[3] The plaintiff also did not appreciate the fact that a notice of motion should have been filed in view of the relief that he had prayed for, before a judgment is entered into. The judgment in default was clearly irregular for non-compliance with O. 13 r. 6(1) RHC, and for the plaintiff's failure to satisfy the court on a motion that he was entitled to the relief sought. Such failure had deprived the defendants of a substantive right to appear at the motion, and argue against the relief. The default judgment should therefore be set aside. (pp 90 d & 92 g-h)

[Appeal allowed; default judgment set aside.]

Case(s) referred to:

Bernstein v. Jackson [1982] 2 All ER 806 ***(refd)***

Dubai Bank Ltd v. Galadari (No 4), The Times, 23 February 1990 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 CLJ 305 FC ***(foll)***

Lam Kong Co Ltd v. Thong Guan & Co (Pte) Ltd [1985] 1 CLJ 412; [1985] CLJ (Rep) 181 SC ***(refd)***

Mahindar Singh v. Amanah Saham Pahang Bhd [1984] 1 CLJ 181; [1984] 2 CLJ (Rep) 205 HC ***(refd)***

Metroinvest Ansalt v. Commercial Union Assurance Co plc [1985] 2 All ER 318 CA ***(refd)***

Morley London Developments Ltd v. Rightside Properties Ltd [1973] 117 SJ 876 CA ***(refd)***

Palaniappa Chettiar v. Tan Jan & Anor [1965] 31 MLJ 182 ***(refd)***

Patel Holding Sdn Bhd v. Estet Pelabuhan Kecil & Anor [1989] 1 MLJ 193 ***(refd)***

PL Construction Sdn Bhd v. Abdullah Said [1988] 1 CLJ 808; [1988] 2 CLJ (Rep) 91 HC ***(refd)***

Seok Mee Seong v. Abdul Wahab Abdul Rahman [1988] 1 CLJ 694; [1988] 2 CLJ (Rep) 415 HC ***(refd)***

Tan Ooi Chee v. Kanching Realty Sdn Bhd [1989] 1 MLJ 519 ***(refd)***

White Weston [1968] 2 QB 647 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 1(1), (2), O. 6 r. 8, O. 13 rr. 1(1), 5, 6(1)

Other source(s) referred to:

The Supreme Court Practice 1997, vol 1, para 2/1/1

For the plaintiff - En Manoharan; M Mahoharan & Co

For the defendant - Cyrus Das (En Nanthabalan); M/s Shook Lin & Bok

Reported by WA Sharif

JUDGMENT

PS Gill J:

On 19 July 2001, I had allowed the appeal of the 1st defendant against the order of the learned registrar who had disallowed the defendant's application to set aside the judgment in default entered against them.

The subject matter of the appeal concerns an alleged act of defamation by the 1st defendant against the plaintiff. In the present proceedings, the plaintiff prayed for the following reliefs:

(1) General damages which he quantified at RM50,000,000 as against each of the defendants;

(2) Exemplary damages;

(3) Special damages;

(4) An injunction restraining the defendant or their agents from repeating the libel against the plaintiff;

(5) Costs; and

(6) Interest.

The plaintiff had effected service of the writ on the 1st defendant on 15 May 2001. Despite service being properly effected, no appearance or pleadings were filed by the 1st defendant. On 28 May 2001, a certificate of non-appearance was filed against the 1st defendant, and on 30 May 2001, a judgment in default of appearance was entered against the 1st defendant. For clarity the judgment in default of appearance reads as follows:

> **PENGHAKIMAN INGKAR KEHADIRAN**
>
> Tiada kehadiran telah dimasukkan oleh defendan pertama dalam tindakan ini. Adalah pada hari ini dihakimkan bahawa defendan pertama hendaklah membayar kepada plaintif gantirugi am, teladan dan teruk ditaksirkan dan faedah pada kadar 8% setahun dari tarikh writ saman sehingga penyelesaian penuh dan kos.
>
> Bertarikh pada 30 haribulan MEI 2001.

On realising the gravity of the said order, the 1st defendant filed a certificate of urgency together with an application, to set aside the said judgment in default. The application was heard before the learned registrar on 12 June 2001, wherein he had dismissed the defendant's application.

Before me, Mr. Cyrus Das counsel for the defendant, in his imitable style, drew my attention to the judgment of 30 May 2001, which he submitted was irregular, in that it was in the form of a final judgment for RM50 million with interest at 8% from the date of the said judgment and costs. He submitted that among the repertoire of reliefs sought by the plaintiff, there was a prayer for an injunction. The defendant's counsel argued that the prayers for damages were for general damages. Counsel referred to the case of *Seok Mee Seong v. Abdul Wahab bin Abdul Rahman* [1988] 1 CLJ 694; [1988] 2 CLJ (Rep) 415, which is authority for the proposition that the words "debt or liquidated demand" does not extend to unliquidated damages, even if the amount of damages is pleaded as a definite figure.

Dr. Cyrus Das submitted that the relief under O. 13 r. 1(1) or O. 13 r. 5, Rules of the High Court 1980, is not available to the plaintiff in this instance, in view of the prayer for injunction, claimed by the plaintiff as against the said defendant. He added that in a situation such as this, against the back drop of prayers, particularly for the injunction, O. 13 r. 6 would be the proper mode if at all, to obtain a judgment in default of appearance. For ease of reference O. 13 r. 6(1) reads as follows:

> (1) Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

The effect of O. 13 r. 6 *(supra)* to my mind is to preclude a plaintiff from entering judgment in default of appearance, in every case in which the indorsement on the writ contains, or includes, a claim which is not squarely within rr. (1) to (4) of this Order, and to require him to proceed with the action as if the defendant had appeared. If therefore, there is indorsed on the writ, a claim for an account, injunction, specific performance, declarations, or rectification, or other remedy, or relief, which falls outside the descriptions specified in rr. (1) to (4), the plaintiff cannot enter judgment in default of appearance, unless he expressly and finally abandons every such remedy or relief.

The rationale underlying the provisions of O. 13 r. 6(1), is that specific relief by its very nature is discretionary. A defendant may well decide, not to defend an action in which such relief is claimed, in the honest belief that he has no defence upon the question of liability. But that does not relieve the plaintiff from delivering his statement of claim, and satisfying the court, upon a motion,

that the case is a fit one for the grant of specific relief. In this I find support in the *dicta* of Gopal Sri Ram JCA, in the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305, where his Lordship had this to say:

> When viewed in this fashion, it is not difficult to see why O. 13 r. 6(1) is worded in the way in which it appears. The rule exists to preserve the discretion of the court in actions for specific relief despite the non-appearance of a defendant. It is not a mere technicality, as suggested by counsel, but has to do with policy considerations that have evolved through the exercise of jurisdiction by a court of equity. To deprive a defendant the right of appearing upon the motion for judgment and arguing that discretion ought not to be exercised in a plaintiff's favour is a serious matter. It constitutes the breach of a substantive right forming part and parcel of the doctrine of procedural fairness. And the entry of a form of judgment in default in a case to which O. 13 r. 6(1) applied has the effect of withholding, from a defendant, without the court's sanction, the procedural fairness to which he is entitled.

In respect to the case at hand, I tend to agree with the submission of Dr. Cyrus Das, that the plaintiff had short circuited the whole process involved in O. 13 r. 6, Rules of the High Court 1980, and proceeded in unholy haste to enter judgment on 30 May 2001. The plaintiff did not appreciate the fact that a notice of motion should have been filed in view of the reliefs that he had prayed for, before a judgment is entered into. The plaintiff's counsel Mr. Manoharan on realising his blunder, and in order to salvage the judgment, immediately informed the court at the hearing of the appeal, that he was abandoning the relief for injunction, and was proceeding purely on the other reliefs. To this sudden turn of events, I have my reservations as to whether the plaintiff is entitled, at this point of time, to make this election. I am cognisant of the fact that the plaintiff is free to elect which relief he wants to pursue, and he is under no duty, to give notice of his election, to abandon any form of relief, which he originally claimed, and on effective abandonment of every remedy, or relief, outside the description in rr. (1) to (4), he is entitled to a judgment under these Rules. Please see *Morley London Developments Ltd. v. Rightside Properties Ltd.* [1973] 117 SJ 876 (CA). But from my understanding and reading of this authority, the effective abandonment of the said reliefs should be done before the said judgment is entered into, and not, after the judgment has been entered, and perfected. The conduct of the plaintiff's counsel presently in requesting the abandonment of the said reliefs, to use a proverbial phrase, amounts to "closing the stable door, after the horse has bolted". I could not at this stage allow such an abandonment, more especially when the said judgment is now being castigated for this very reason. Viewed dispassionately, and bearing in mind the *dicta* of Gopal Sri Ram JCA, in *Lai Yoke Ngan (supra)* I am convinced, that the judgment in default entered on 30 May 2001, is irregular.

On the curative powers under O. 2 r. 1, Rules of the High Court 1980, it is my considered view that although, under the provisions of O. 2 r. 1(1), Rules of the High Court 1980, non-compliance with the rules of procedure is to be regarded as mere irregularity, and not a nullity, the court, in exercising its discretionary powers, must exercise its discretion, to cure such procedural irregularity, on correct principles.

The court, when exercising its discretion to correct irregularities under O. 2 r. 1(2), will perform its task in this way.

In most cases the manner in which the court exercises its powers under O. 2 r. 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice, as a direct consequence of the irregularity, but the rule is so framed as to give the court the widest possible power. Hence prejudice, or lack of prejudice, although often the all-important factor in the exercise of the discretion, is not always the only relevant factor (*Metroinvest Anstalt v. Commercial Union Assurance Co. plc* [1985] 1 WLR 513, [1985] 2 All ER 318, CA). The Supreme Court Practice 1997, vol. 1, para. 2/1/1, Exercise of discretion to correct irregularities.

Even though the court has the widest possible power to do justice, not all irregularities can be cured under O. 2 r. 1(2). There is no power to remedy irregularities of a more fundamental kind. Sometimes the irregularity is so fundamental a defect in procedure, that the court is unwilling to exercise the discretion in O. 2 r. 1(2) to disregard the irregularity. In such a case, the court will decline to exercise its power under r. 1(2) to make any dispensing order, waiving the irregularity.

The power given to the court by O. 2 r. 1 is a power to cure irregularities consisting of failures to comply with the rules. There is no power to remedy failures of a more fundamental nature. Thus the requirement that the plaintiff be in existence, at the date of the commencement of the proceedings, is a basic principle of law, rather than a requirement of the rules. If an action is brought by a non-existent company, it must therefore be struck out: except in the case of a mere misnomer, the non-existent plaintiff cannot apply to have another person joined as a co-plaintiff (*Dubai Bank Ltd. v. Galadari (No. 4)*, The Times, 23 February 1990).

In *Bernstein v. Jackson* [1982] 1 WLR 1082; [1982] 2 All ER 806, the failure to renew a writ for service was judged as an irregularity, which constituted such a fundamental defect in procedure, that the court would not exercise the discretion to disregard it under O. 2 r. 1(2), since O. 6 r. 8 provides a compendious set of rules for the extension and renewal of writs. In *Lam Kong Co. Ltd. v. Thong Guan & Co (Pte) Ltd.* [1985] 1 CLJ 412; ([1985] CLJ

(Rep) 181) the plaintiff in an action for specific performance of a contract for the sale of land had entered a default judgment against the defendant when it failed to enter an appearance. The plaintiff had acted contrary to the requirements of O. 13 r. 12, which provides for the action to be set down on a motion for judgment. The Supreme Court held that the irregular judgment constituted such a fundamental defect that it was not curable. This is what Abdul Hamid CJ (Malaya) said, at p. 415 (p. 183):

> It is to be observed that the effect of the rule (Order 13 r. 12) was to disentitle the respondents from entering default judgment on a writ specially indorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the court or judge to consider giving judgment as upon the claim the court or judge should consider the respondents to be entitled. At that point of time, therefore, judgment in default was not only given in breach of r. 12 but had resulted in a failure to comply with r. 11 of Order 27. In the circumstances, we are constrained to hold that the breach and the non-compliance were not merely irregularities but fundamental defects. The fundamental defect was not in our view curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action.

In *White Weston* [1968] 2 QB 647, CA, it was held (Russel and Sachs LJJ) that a judgment should be set aside unconditionally *ex debito justitiae,* without referring to the new rule (ie, RSC O. 2 r. 1(2)) because it was a plain case of the defendant being totally unaware of the proceedings at all. Both Russel and Sachs LJJ thought that in view of a fundamental defect, one did not get much assistance, from considering, whether a judgment is to be described as having been obtained irregularly, or whether it was a nullity. Russel LJ said, *ibid*, at 659 (and Sachs LJ agreed with him, *ibid*, 662).

> I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae,* to have the judgment set aside.

Applying the above principles to the facts of the appeal, it is clear beyond doubt that the default judgment of 30 May 2001, is irregular and non-compliance, in particular of O. 13 r. 6(1), by the failure of the plaintiff to satisfy the court on a motion, that the plaintiff is entitled to the reliefs sought. There was an effective deprivation of allowing the defendant a right to appear at the motion, and arguing that the reliefs sought, should not be granted to the plaintiff. This I hold is a serious matter and transgresses a substantive right, which forms part and parcel, of the doctrine of procedural fairness. The entry of the judgment of 30 May 2001 has the effect of withholding from the

defendant a procedural fairness he is entitled to, which is a failure of a fundamental kind. On this ground alone, I am sanguine enough to hold that the judgment of 30 May 2001, is irregular and should be set aside. On this ground alone the appeal should be allowed.

The plaintiff has pursuant to the order of 30 May 2001 filed an application for assessment of damages, which is pending hearing before the learned registrar. In view of my sentiments on the said order of 30 May 2001, it is my considered view that the plaintiff has absolutely no right to obtain this order for assessment of damages. Thus said, the application which is pending for hearing should be set aside.

Counsel for the defendant, had also in the course of his submission argued that in the event he had failed to establish that the judgment of 30 May 2001 was irregular, there were enough cogent reasons cited for the 1st defendant's remiss in not filing this appearance within the requisite time and further there was enough evidence to establish on affidavit to disclose that the 1st defendant had a defence on the merits.

I am not going to delve into the submissions of the plaintiff and defendant's counsel in respect of this aspect, for I am confident enough to hold that the judgment of 30 May 2001 was irregular, and one would not thus need to examine the merits of the defence at this stage. However, I wish to put on record my views on a particular aspect of the submissions of the defendant and plaintiff's counsel which I hold has an important bearing when considering a default judgment which is obtained regularly. It is trite law that where a default judgment is obtained regularly, in order to succeed in setting it aside, the defendant must file an affidavit of merits, ie, the defence must disclose by affidavit evidence that *prima facie* he has a defence of merits. The judgment of Lee Hun Hoe CJ in *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 is illuminating on this issue. In this particular instance the defendant had made scant mention in their affidavit, as to the arguable, or triable issues raised, but instead annexed as an exhibit a purported defence. Much was made of this by the plaintiff, to the effect that the plaintiff had not condescended into deposing in their affidavit in support, the triable issues to their defence. The case of *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. (supra)* was cited by the plaintiff's counsel in support of this. But Dr. Cyrus Das for the defence has regaled me with authorities that hold a contrary view, *vis-a-vis* that a draft defence which is exhibited to the supporting affidavit in the application to set aside the judgment in default can be considered when dealing with the setting aside of the judgment in default. The cases of *PL Construction Sdn. Bhd. v. Abdullah bin Said* [1988] 1 CLJ 808; [1988] 2 CLJ (Rep) 91, *Mahindar Singh v. Amanah Saham Pahang Bhd.*

[1984] 1 CLJ 181; [1984] 2 CLJ (Rep) 205, *Tan Ooi Chee v. Ranching Realty Sdn. Bhd.* [1989] 1 MLJ 519, *Patel Holding Sdn. Bhd. v. Estet Pelabuhan Kecil & Anor.* [1989] 1 MLJ 193, *Palaniappa Chettiar v. Tan Jan & Anor.* [1965] 31 MLJ 182, were cited.

It is pertinent to bear in mind that in all these cases, the learned judges had considered the draft defences that were filed, when deciding whether to set aside regular judgment in default. Such has apparently been the accepted practice. The learned registrar in this particular instance however, took the view that since the defence had not been deposed in an affidavit, and a purported defence was merely annexed to the said affidavit, the whole application of the defence was a non-starter.

My view is simply this. An affidavit of merits must be supported by an application to set aside a regular judgment. However, if the purported defence is exhibited to an affidavit, it in effect forms part of the affidavit, and should be accepted as part of an affidavit of merits. The case of *Palaniappa Chettiar v. Tan Jan & Anor.* [1965] 31 MLJ 182 is cited in support. But to merely refer to a purported defence which is not part of the affidavit and unsworn is wholly inadmissible and goes against the authority of *Fira Development (supra).* Fortunately, the defendant in this instance here, annexed the said purported defence to their affidavit, and it could be regarded as if they had copied it out in the affidavit. See *Palaniappa Chettiar (supra)*. Appeal allowed with costs.